Nos. 17-1717, 18-18

In the Supreme Court of the United States

THE AMERICAN LEGION, *et al.*,
Petitioners,

v.

AMERICAN HUMANIST ASSOCIATION, *et al.*,
Respondents.

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION,
Petitioner,

v.

AMERICAN HUMANIST ASSOCIATION, *et al.*,
Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

AMICUS CURIAE BRIEF OF THE AMERICAN CENTER FOR LAW & JUSTICE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS*[1]

Amicus, the American Center for Law & Justice ("ACLJ"), is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys often appear before this Court as counsel for a party, *e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993), or *amici curiae*, *e.g.*, *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017); *Matal v. Tam*, 137 S. Ct. 1744 (2017); *Zubik v. Burwell*, 136 S. Ct. 1557 (2016).

In addition, ACLJ has represented numerous local governments in challenges involving passive displays both in this Court, *Pleasant Grove City v. Summum*, and in the lower courts, *e.g.*, *ACLU of Kentucky v. Mercer County*, 432 F.3d 624 (6th Cir. 2005); *ACLU Nebraska Found. v. City of Plattsmouth*, 419 F.3d 772 (8th Cir. 2005) (en banc); *Soc'y of Separationists v. Pleasant Grove City*, 416 F.3d 1239 (10th Cir. 2005); *Books v. City of Elkhart*, 235 F.3d 292 (7th Cir. 2000).

Amicus therefore has considerable legal expertise in the subject matter underlying the petitions.

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[1] Counsel of record for the parties received notice of the intent to file this brief. Petitioners have given blanket consent for the filing of *amicus* briefs and counsel for Respondents has provided written consent. No counsel for any party in this case authored this brief in whole or in part. No person or entity aside from *Amicus*, their members, or their respective counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT AND INTRODUCTION

Relying on this Court's decision in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and the perceptions of a "reasonable observer," the Fourth Circuit has ordered the removal of a near century-old monument dedicated to the memory of local soldiers who perished in the Great War. What is in need of dismantling in this case, however, is not the memorial at issue, but the confounding jurisprudence used by the court below in reaching its erroneous conclusion.

The Fourth Circuit's rationale and decision conflicts with this Court's decisions in *Van Orden v. Perry*, 545 U.S. 677 (2005), and *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014). Despite the fact that those decisions notably eschewed both *Lemon* and the "reasonable observer test" in deciding whether a passive display and legislative prayer violated the Establishment Clause, the Fourth Circuit invoked both to dispose of Bladensburg's Peace Cross.

This Court should grant the petitions to reaffirm what it held in *Van Orden* and to make explicit what it implicitly held in *Town of Greece*: the test for adjudging whether state action that partakes of the religious violates the Establishment Clause, be it prayer or a passive display, does not turn on the application of any prongs of *Lemon*, including a reasonable observer's perceptions of endorsement. Instead, according to those two decisions, a court should look to relevant historical practices and understandings and whether the state action at issue imposes unwarranted governmental coercion on others. This jurisprudential standard will not only provide lower courts a more objective

benchmark in determining whether a passive display comports with the Establishment Clause, such as the one at issue here, it will provide state and local governments firmer guidance in deciding whether to keep, alter, or create anew a governmental display that partakes of the religious. It will reaffirm the important truth that the Constitution does not "require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984).

The petitions should be granted.

ARGUMENT

I. *Van Orden*'s Eschewal of *Lemon*.

In ruling that the public display of the Peace Cross violates the Establishment Clause, the Fourth Circuit decided the case "pursuant to the three-prong test in *Lemon* with due consideration given to the factors outlined in *Van Orden*." *Am. Humanist Ass'n v. Md.-Nat'l Capital Park & Planning Comm'n*, 874 F.3d 195, 206 (4th Cir. 2017) ("*AHA*"). Given the fact that neither the *Van Orden* plurality nor Justice Breyer's concurrence in that case thought *Lemon* to be beneficial, let alone necessary, to evaluating the Texas Ten Commandments monument, the Fourth Circuit's rubric makes little sense. *Van Orden* has radically

undermined, at least with respect to passive displays, any continuing authority of *Lemon*.[2]

In *Van Orden*, this Court upheld a passive display of the Ten Commandments on the grounds of the Texas State Capitol. While the Fifth Circuit used *Lemon* to decide that case, holding that that the monolith was created with a valid secular purpose and did not impermissibly endorse religion, *Van Orden v. Perry*, 351 F.3d 173, 180, 182 (5th Cir. 2003), this Court did not use the *Lemon* test. In a plurality opinion, Chief Justice Rehnquist noted that the "test" derived from *Lemon* was simply "not useful in dealing with the sort of passive monument" like the one at issue in that case. The plurality noted that *Lemon* and its "prongs" were described as providing "no more than helpful signposts" only two years after that decision was handed down, and the test had only been selectively used by this Court in deciding challenges under the Establishment Clause. *Van Orden*, 545 U.S. at 686 (plurality opinion); *see also Lynch*, 465 U.S. at 679 (noting that the Court did not consider *Lemon* to be "relevant" in deciding *Marsh v. Chambers*, 463 U.S. 783 (1983), or "useful" in *Larson v. Valente*, 456 U.S. 228 (1982)).

Instead of applying any part of *Lemon*'s test to the Texas monument, and doubting "the fate of the *Lemon*

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[2] To be clear, *Amicus* believes that the monument at issue satisfies any standard for measuring an Establishment Clause violation, including the one set forth in *Lemon*. The gravamen of this brief is simply that the "much-maligned test" of *Lemon* should no longer be retained. *ACLU v. Schundler*, 104 F.3d 1435, 1440 (3d Cir. 1997); *Glassroth v. Moore*, 335 F.3d 1282, 1295 (11th Cir. 2003) (beginning Establishment Clause inquiry with the "obligatory observation that the *Lemon* test is often maligned").

test in the larger scheme of Establishment Clause jurisprudence," the plurality undertook an "analysis . . . driven both by the nature of the monument and by our Nation's history." 545 U.S. at 686. Surveying the country's legal and cultural heritage, it held that even though the Ten Commandments are unquestionably religious, they also have "an undeniable historical meaning." *Id.* at 690.

Based on that dual significance of the Decalogue—"partaking of both religion and government"—the plurality ruled that Texas's display of the monument, standing among other monuments "representing the several strands in the State's political and legal history," was consistent with the demands of the Establishment Clause. *Id.* at 690-91.

Justice Breyer concurred in the judgment only. Like the plurality, Justice Breyer did not use *Lemon* to evaluate the monolith's legality. While he opined that the display might survive the Court's more formal Establishment Clause tests, *id.* at 703 (Breyer, J., concurring in the judgment), Justice Breyer preferred instead to apply "the exercise of legal judgment," an analysis that would "reflect and remain faithful to the underlying purposes of the Clauses, and . . . take account of context and consequences measured in light of those purposes." *Id.* at 700. Evaluating the underlying case-specific facts of the case in tandem with these purposes, Justice Breyer believed that the Texas display "falls on the permissible side of the constitutional line." *Id.* at 703.

In neither the plurality decision nor Justice Breyer's concurrence did a "reasonable observer's" perceptions

of endorsement play any role.[3] It was not necessary to decide whether this reasonable observer thought that the State of Texas was advocating the Ten Commandments as a religious code, or a moral code, or both, or neither. This observer's feelings of exclusion, his religious sensibilities, or his thoughts of religious endorsement at viewing the monument were simply not considered.

In short, and in direct conflict with the legal framework used by the court below, *Van Orden* was decided *without Lemon* and the need to invoke any "reasonable observer."

II. Disarray of Current Establishment Clause Jurisprudence

The Fourth Circuit is not alone in continuing to apply *Lemon* after *Van Orden* in deciding cases involving passive displays. *See, e.g., Am. Atheists, Inc. v. Port Auth.*, 760 F.3d 227 (2d. Cir. 2014) (Ground Zero cross at the National September 11 Museum); *Felix v. City of Bloomfield*, 841 F.3d 848 (10th Cir. 2016) (Ten Commandments monument). The Eighth Circuit, on the other hand, has adhered to *Van Orden*. *See, e.g., ACLU Neb. Found. v. City of Plattsmouth*, 419 F.3d 772, 778, n.8 (8th Cir. 2005) (en banc) ("Taking our cue from Chief Justice Rehnquist's opinion for the Court

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[3] The "reasonable observer" standard of the endorsement test—a modification of the purpose and effects prongs of *Lemon*—was first proposed by Justice O'Connor in *Wallace v. Jaffree*, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring in judgment) (stating that the relevant issue was whether an "objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools").

and Justice Breyer's concurring opinion in *Van Orden*, we do not apply the *Lemon* test."); *Red River Freethinkers v. City of Fargo*, 764 F.3d 948 (8th Cir. 2014) (same). And in a case involving a public display of the Bible, the Fifth Circuit focused on both Justice Breyer's *Van Orden* concurrence and the "reasonable observer" standard—nowhere, as mentioned, found in Justice Breyer's opinion itself. *See Staley v. Harris Cnty.*, 461 F.3d 504 (5th Cir. 2006).

Additionally, the Ninth Circuit has held that while *Lemon* "remains the general rule for evaluating whether an Establishment Clause violation exists," it does "not use the *Lemon* test to determine the constitutionality of some longstanding plainly religious displays that convey a historical or secular message in a nonreligious context." *Card v. City of Everett*, 520 F.3d 1009, 1016 (9th Cir. 2008). But subsequent to *Card*, in the protracted litigation over the Mount Soledad Cross, the Ninth Circuit used *both Lemon* and *Van Orden* to adjudicate the case. *Trunk v. City of San Diego*, 629 F.3d 1099 (9th Cir. 2011).

Outside the public display context, and given this Court's movement away from *Lemon* in such other cases, *e.g.*, *Cutter v. Wilkinson*, 544 U.S. 709, 717, n.6 (2005) (noting, after setting forth the *Lemon* test, "[w]e resolve this case on other grounds"), the lower courts are in disarray as to which Establishment Clause test to apply, or whether to apply more than one of them.[4]

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[4] This Court's recent Establishment Clause decision in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), continues the trend of not using *Lemon*.

The Fifth Circuit, for example, has used a "multi-test analysis" involving "*Larson v. Valente*'s no-sect-preference test," prongs of "the *Lemon* test," "*Lynch*'s endorsement test," and a coercion examination under *Lee v. Weisman*, 505 U.S. 577 (1992). *Croft v. Perry*, 624 F.3d 157, 165-69 (5th Cir. 2010).

Recently, the Sixth Circuit "weave[d] together three main jurisprudential threads" for deciding a case arising under the Establishment Clause: "the *Lemon* test," "an endorsement analysis," and "a historical approach." *Smith v. Jefferson Cnty. Bd. of Sch. Comm'rs*, 788 F.3d 580, 586-87 (6th Cir. 2015).

Earlier this year, the Seventh Circuit noted in a case involving a public school's holiday show that this Court "has employed at least three ways to assess whether a local governmental body . . . violates the Establishment Clause: the endorsement, coercion, and purpose tests." *Freedom from Religion Found., Inc. v. Concord Cmty. Schs.*, 885 F.3d 1038, 1045-46 (7th Cir. 2018). Concurring in the judgment in that case, Judge Easterbrook doubted the correctness of many of those tests and wrote that, under a proper reading of the Establishment Clause, "[i]t takes taxation or compulsory worship to establish a religion; some form of coercion is essential." *Id.* at 1053 (Easterbrook, J., concurring in the judgment).

In light of the various and motley frameworks used by the lower courts in adjudicating Establishment Clause challenges, it is little wonder that the jurisprudence in this area has been described as a "judicial morass," *Green v. Haskell Cnty. Bd. of Comm'rs*, 574 F.3d 1235, 1235 n.1 (10th Cir. 2009) (Kelly, J., dissenting from denial of rehearing), "rife

with confusion," *Croft*, 624 F.3d at 165, and as "Establishment Clause purgatory." *American Civil Liberties Union of Ky. v. Mercer Cnty.*, 432 F.3d 624, 636 (6th Cir. 2005).

Indeed, given that numerous past and present Justices of this Court have opined on the lack of clarity, the lower courts can hardly be blamed for their confusion. *See, e.g.*, *Rowan Cnty. v. Lund*, No. 17-565, 2018 U.S. LEXIS 4040, at *1 (June 28, 2018) (Thomas, J., dissenting from denial of certiorari, joined by Gorsuch, J.) ("This Court's Establishment Clause jurisprudence is in disarray. Sometimes our precedents focus on whether a 'reasonable observer' would think that a government practice endorses religion; other times our precedents focus on whether a government practice is supported by this country's history and tradition."); *Elmbrook Sch. Dist. v. Doe*, 134 S. Ct. 2283, 2284 (2014) (Scalia, J., dissenting from denial of certiorari) (lamenting the "infinitely malleable standard [that] asks whether governmental action has the purpose or effect of 'endorsing' religion"); *Mount Soledad Mem'l Ass'n v. Trunk*, 567 U.S. 944, 944 (2012) (Alito, J., concurring in the denial of certiorari) ("This Court's Establishment Clause jurisprudence is undoubtedly in need of clarity."); *Wallace v. Jaffree*, 472 U.S. 38, 110 (1985) (Rehnquist, J., dissenting) ("The three-part test [of *Lemon*] has simply not provided adequate standards for deciding Establishment Clause cases, as this Court has slowly come to realize."); *Comm. for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting) (criticizing "the sisyphean task of trying to patch together the blurred, indistinct, and variable barrier described in *Lemon*").

In sum, as the district court noted in this very case, "Establishment Clause jurisprudence is . . . a trial judge's nightmare." *Am. Humanist Ass'n v. Md. Nat'l-Capital Park & Planning Comm'n*, 147 F. Supp. 3d 373, 381 (D. Md. 2015).[5] Now is the time for this Court to relieve the lower courts from their collective bad dream, laying to rest, once and for all, the recurring "ghoul" of that nightmare. *See Lamb's Chapel*, 508 U.S. at 398 (Scalia, J., concurring in judgment).

III. *Town of Greece* sets forth the appropriate test for deciding Establishment Clause claims.

A. The Historical Foundations Criterion

Nine years after this Court's decision in *Van Orden*, and consistent with that decision, the Court in *Town of Greece* provided an objective jurisprudential framework for resolving Establishment Clause challenges such as the one at issue here. That framework does not involve the subjective task of discerning whether a reasonable observer would think the government is endorsing religion through a public display or other form of state action, or the application of one or more prongs of the *Lemon* test.

In *Town of Greece*, this Court was presented with the issue of whether sectarian invocations at the beginning of town council meetings comported with the

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[5] *See also Kondrat'yev v. City of Pensacola*, Case No.: 3:16-cv-195, 2017 U.S. Dist. LEXIS 203588, at *4 (N.D. Fla. June 19, 2017), *appeal pending*, No. 17-13025 (11th Cir.) (describing current Establishment Clause jurisprudence, in case involving a public display of a cross, as "historically unmoored, confusing, [and] inconsistent").

Establishment Clause. The Second Circuit reasoned that because "an objective, reasonable person would believe that the town's prayer practice had the effect of affiliating the town with Christianity," the council's prayers were unconstitutional. *Galloway v. Town of Greece*, 681 F.3d 20, 33 (2d Cir. 2012).

In reversing that decision, however, this Court—like the plurality opinion and Justice Breyer's concurrence in *Van Orden*—did not suggest that the Second Circuit misapplied *Lemon*, or any of its prongs, or that the "reasonable observer" would conclude differently. In fact, except for being cited once in dissent, *Lemon* is nowhere invoked, or even mentioned, in *Town of Greece*. 134 S. Ct. at 1841 (Breyer, J., dissenting).[6] The Court thus dispensed with divining the mind of a hypothetical "reasonable observer" to determine endorsement and adopted a different analytical framework entirely.

Rather, stating that "the Establishment Clause must be interpreted 'by reference to historical practices and understandings,'" 134 S. Ct. at 1819 (quoting *County of Allegheny v. ACLU*, 492 U.S. 573, 670 (1989) (Kennedy, J.)), the Court looked to objective and historical facts, including the longstanding tradition of legislative prayer dating back to the founding generation. The Court held that the line that must be drawn "between the permissible and the impermissible" under the Establishment Clause has nothing to do with the reasonable observer and his perceptions of endorsement, but instead must be "one

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[6] The term "reasonable observer" appears once in the plurality, but only in passing and not as an invocation of the "endorsement test." *Id.* at 1825 (plurality opinion).

which accords with history and faithfully reflects the understanding of the Founding Fathers." *Id.* (quoting *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 294 (1963) (Brennan, J., concurring)).

Importantly, *Town of Greece* nowhere suggests that its history-based criterion is limited only to the context of legislative prayer. In fact, the Court made it clear that its decision in *Marsh v. Chambers*, 463 U.S. 783 (1983), often described as an "exception" to Establishment Clause jurisprudence, 134 S. Ct. at 1818, "must not be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation." *Id.* at 1819. In other words, a historical foundation is not a basis for holding that an otherwise unconstitutional practice or display should be permitted, but a criterion for determining their constitutionality in the first place. *See Elmbrook Sch. Dist. v. Doe*, 134 S. Ct. 2283, 2284 (2014) (Scalia, J., dissenting in denial of certiorari) ("*Town of Greece* left no doubt that the Establishment Clause must be interpreted by reference to historical practices and understandings.") (internal quotations omitted).[7]

A historical foundation criterion, however, should not be "confined to the inquiry into whether the challenged practice itself is a part of our accepted traditions dating back to the Founding." *Allegheny*, 492 U.S. at 669 (Kennedy, J.). Instead, "[w]hatever test we

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[7] *See also* Eric Rassbach, Town of Greece v. Galloway*: The Establishment Clause and the Rediscovery of History*, 2013-14 Cato Sup. Ct. Rev. 71, 84 (noting that, in *Town of Greece*, the Court has "introduce[d] a 'historical override' to all Establishment Clause claims," and "*Marsh*'s historical analysis trumps the *Lemon* test, not the other way around").

choose to apply must permit not only legitimate practices two centuries old but also any other practices with no greater potential for an establishment of religion." *Id.* Nowhere in *Town of Greece* (or in any other decision, for that matter) does the Court suggest that *only* practices engaged in by the founding generation could withstand an Establishment Clause challenge. While, for example, the tradition of this Court's invocation, "God save the United States and this Honorable Court," may not stretch back all the way back to the founding of the Court, it is nonetheless a tradition in keeping with the Founders' understanding of what the Establishment Clause allows. The same rationale applies to the Pledge of Allegiance, the National Motto, and Presidential proclamations and speeches that invoke the Divine. *Town of Greece*, 134 S. Ct. at 1825 (plurality opinion); *see also Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 25-30 (2004) (Rehnquist, C.J., concurring in the judgment).[8]

Finally, *Town of Greece*'s history criterion is consistent with this Court's observations that there is an "unbroken history of official acknowledgment by all three branches of government of the role of religion in American life," *Lynch*, 465 U.S. at 674, and that a "relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself

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[8] As Michael McConnell has observed: "The early practice in the Republic was replete with governmental proclamations and other actions that endorsed religion in noncoercive ways, without favoring one sect over another. . . . The Religion Clauses were not directed against the evil of perceived messages, but of government power." *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115, 155 (1992).

become inconsistent with the Constitution," *Lee v. Weisman*, 505 U.S. 577, 598 (1992). Justice Scalia's call for "an Establishment Clause jurisprudence that is in accord with our Nation's past and present practices, and that can be consistently applied," also comports with the approach taken in *Town of Greece*. *Van Orden*, 545 U.S. at 692 (Scalia, J., concurring).

Looking at the "nature of the monument" at issue in this case, *Van Orden*, 545 U.S. at 686, and the "historical practices and understandings" of the undeniable role religion has played in the character and culture of this country, *Town of Greece*, 134 S. Ct. at 1819, it is clear that the Fourth Circuit gravely erred as a matter of law in holding that Bladensburg Peace Cross violates the Establishment Clause.

The cross was not erected with the intent to proclaim Christianity as a government-sanctioned religion. It was not created to be a center of religious worship or to honor and praise the Christian faith. The cross, quite simply but profoundly, was erected "to honor 49 World War I soldiers" from Prince George's County. *AHA*, 874 F.3d at 200. Indeed, what a plurality of this Court observed in *Salazar v. Buono*, 559 U.S. 700 (2010), regarding a similar memorial, with a similar history, applies with equal force here:

> Private citizens put the cross on Sunrise Rock to commemorate American servicemen who had died in World War I. Although certainly a Christian symbol, the cross was not emplaced on Sunrise Rock to promote a Christian message. . . . Placement of the cross on Government-owned land was not an attempt to set the *imprimatur* of the state on a particular

> creed. Rather, those who erected the cross intended simply to honor our Nation's fallen soldiers.

559 U.S. at 715 (Kennedy, J., plurality).

The fact that a cross was chosen as the object to memorialize the soldiers, instead of a poppy or some other symbol from World War I, *see AHA*, 874 F.3d at 207, n.10, does not doom the monument from start, as the panel below all but suggests. Instead, as was noted in *Buono*,

> a Latin cross is not merely a reaffirmation of Christian beliefs. It is a symbol often used to honor and respect those whose heroic acts, noble contributions, and patient striving help secure an honored place in history for this Nation and its people. . . . It evokes thousands of small crosses in foreign fields marking the graves of Americans who fell in battles, battles whose tragedies are compounded if the fallen are forgotten.

559 U.S. at 721 (Kennedy, J., plurality).

In fact, it has been a long historical practice in this country, consistent with the historical understanding of the Establishment Clause, to use the symbol of the cross in the context of giving honor to members of the armed forces. As has been correctly observed, as a straightforward factual and historical matter:

> 114 Civil War monuments include a cross; the fallen in World Wars I and II are memorialized by thousands of crosses in foreign cemeteries; Arlington Cemetery is home to three war

> memorial crosses, and Gettysburg is home to two more; and military awards often use the image of a cross to recognize service, such as the Army's Distinguished Service Cross, the Navy Cross, the Air Force Cross, the Distinguished Flying Cross, and the most famous cross meant to symbolize sacrifice—the French "Croix de Guerre."

Trunk v. City of San Diego, 660 F.3d 1091, 1100 (9th Cir. 2011) (Bea, J., dissenting from the denial of rehearing en banc).

Like the Ten Commandments monument at issue in *Van Orden*, and the sectarian prayers at issue in *Town of Greece*, the Peace Cross partakes of both the religious and the secular. The cross is not being used to call attention to the history or importance of Christianity, but the history and importance of 49 local soldiers who made the ultimate sacrifice in defense of their country. By no means is it a "treacherous step towards establishment of a state church." *Town of Greece*, 134 S. Ct. at 1818; *see also Lynch*, 465 U.S. at 678 ("'The real object of the [First] Amendment was . . . to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government.'") (quoting J. Story, *Commentaries on the Constitution of the United States*, Vol. III, 728 (1833)). And just as courts should not act as "supervisors and censors of religious speech" in the context of religious invocations, 134 S. Ct. at 1822, neither should they act, as did the Fourth Circuit here, as park supervisors, adjudging the legitimacy of a public monument that was erected, and

is maintained, for an obvious (and laudable) secular reason.

While *Amicus* maintains that the monument would pass constitutional muster under *Lemon*, and that the Fourth Circuit was wrong to conclude otherwise, if *Lemon* can be so readily applied to order the removal a longstanding, historical monument such as the Peace Cross, it is *Lemon* that must be discarded, not the monument. *Cf. Town of Greece*, 134 S. Ct. at 1811 ("A test that would sweep away what has so long been settled would create new controversy and begin anew the very divisions along religious lines that the Establishment Clause seeks to prevent.").

B. The Coercion Criterion

Town of Greece did not look solely to historical practices and understandings in determining the constitutionality of the challenged prayer practice, but to an additional factor: *coercion*. "It is an elemental First Amendment principle that government may not coerce its citizens 'to support or participate in any religion or its exercise.'" 134 S. Ct. at 1825 (opinion of Kennedy, J.) (quoting *Allegheny*, 492 U.S. at 659 (Kennedy, J.)); *see also id.* (citing *Van Orden*, 545 U.S. at 683 (plurality opinion) (recognizing that our "institutions must not press religious observances upon their citizens")).

Though a majority in *Town of Greece* did not agree on what type or level of coercion would have to be present in order to find an Establishment Clause violation, there would be no need to resolve that issue in this case because Respondents have not been coerced

into doing *anything*, much less "compelled . . . to engage in a religious observance." *Id.*

Like the plaintiffs in *Town of Greece*, who "stated that the prayers gave them offense and made them feel excluded and disrespected," *id.* at 1826, the Respondents claim that they have come into "unwelcome direct contact with the Cross" and "are offended by the prominent government display of the Cross." *AHA*, 874 F.3d at 203. While one of the individual plaintiffs alleged that he "is personally offended and feels excluded" by the monument, the other two individual plaintiffs did not even allege offense—only that they have come into "unwelcome contact" with the monument and "object" to it. Complaint, ¶¶ 6-10, ECF Doc. 1, *American Humanist Ass'n et al. v. Md.-Nat'l Capital Park & Planning Comm'n*, 8:14-cv-00550-DKC.[9]

"Offense, however, does not equate to coercion." *Town of Greece*, 134 S. Ct. at 1826 (opinion of Kennedy, J.). Just as "[a]dults often encounter speech they find disagreeable," *id.*, so too might they encounter disagreeable monuments or displays, as Respondents have here. "[A]n Establishment Clause violation is not

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[9] For these reasons, the Fourth Circuit erred in holding that Respondents have Article III standing to press their Establishment Clause claim. *See AHA*, 874 F.3d at 203-4. Like the plaintiffs in *Valley Forge Christian College v. Americans United for Separation of Church & State*, Respondents "fail to identify any personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms." 454 U.S. 464, 485-86 (1982).

made out any time a person experiences a sense of affront from the expression" of views which are contrary to his own. *Id*. Indeed, it is difficult to see how "passive and symbolic" displays create a "risk of infringement of religious liberty." *Allegheny*, 492 U.S. at 662 (Kennedy, J.). Cases involving public school children are inapplicable here. *See, e.g., Lee v. Weisman*. 545 U.S. at 691 (plurality opinion); *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. at 203.

Here, Respondents are not forced into participating in any religious exercise by a passive monument that they only observe while traveling in the vicinity. *AHA*, 874 F.3d at 202; *see Allegheny*, 492 U.S. at 664 (Kennedy, J.) ("Passersby who disagree with the message conveyed by these displays are free to ignore them, or even to turn their backs, just as they are free to do when they disagree with any other form of government speech."); *see also Am. Jewish Cong. v. Chicago*, 827 F.2d 120, 133 (7th Cir. 1987) (Easterbrook, J., dissenting) ("The holder of a nickel need not trust in God, no matter what the coin says, and need not contribute the nickel (or even three pence) to a church.").

The lower court's Establishment Clause analysis is therefore not only plainly inconsistent with *Town of Greece*'s historical foundations criterion, but its coercion criterion as well. Indeed, as a practical matter, why should the plaintiffs in *Town of Greece*, who witnessed sectarian prayers at a town council meeting, and who felt offended thereby, ultimately fail in their Establishment Clause challenge, while Respondents here, who come into "unwelcome contact" with a

passive Latin cross while driving a car or riding a bike, prevail? *See* Complaint, ¶ 6 (noting that Plaintiff Lowe often passes by the cross when driving his car or riding his bike). If *Town of Greece* means what it says, then the monument in this case can no more violate the Establishment Clause than the sectarian legislative prayers in *Town of Greece*. It strains credulity to suggest otherwise.

While this Court did not *explicitly* announce in *Town of Greece* the demise of *Lemon*, including its endorsement and reasonable observer progeny, the rationale of *Town of Greece*, which notably avoided those rubrics entirely, strongly indicates that they have now been abrogated. At least two Justices have noted that they think so. *See Elmbrook Sch. Dist.*, 134 S. Ct. at 2284 (Scalia, J., dissenting from the denial of certiorari, joined by Thomas, J.) ("*Town of Greece* abandoned the antiquated 'endorsement test,' which formed the basis for the decision below."). But until this Court makes a clear and unambiguous announcement, the lower courts will continue applying the much maligned test of *Lemon*, even in the face of *Town of Greece*, which did not rely on that decision despite the obvious and admittedly religious nature of the practice at issue.

The petitions in this case present a clean vehicle for this Court to reaffirm what it held in *Van Orden* and to make explicit what it held in *Town of Greece*: *Lemon* and the reasonable observer's perceptions of endorsement have no role to play in deciding cases under the Establishment Clause—*at least* with respect to passive displays and prayer practices. An express ruling to that effect will provide much-needed clarity to

the courts of appeals. *See Concord Cmty. Schs.*, 885 F.3d at 1045 n.1 (noting that it did "feel free to jettison" the endorsement test in light of *Town of Greece* because the Court in that case did not make it "explicit"); *Jefferson Cnty. Bd. of Sch. Comm'rs*, 788 F.3d at 601 (Batchelder, J., concurring in part) ("[N]otwithstanding *Town of Greece*'s broad language regarding the test that properly governs the Establishment Clause . . . unless and until the Supreme Court explicitly holds that it has abandoned the *Lemon*/endorsement test, the lower courts are bound to continue applying that test in contexts where the Court has previously employed it"); *see also Felix v. City of Bloomfield*, 847 F.3d 1214, 1221 (10th Cir. 2017) (Kelly, J., dissenting from the denial of rehearing en banc) (noting that "returning to a more historically-congruent understanding of the Establishment Clause is the ultimate province of the Supreme Court").

CONCLUSION

For the foregoing reasons, *Amicus* respectfully asks the Court to grant the petitions.

Respectfully submitted,

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